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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-741

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, Individually and on behalf of all other persons similarly situated,

Petitioners,

—v.—

CLARENCE M. KELLEY, Director of the Federal Bureau of Investigation, JOHN F. MALONE, Assistant Director in Charge of the Federal Bureau of Investigation in New York City and THE AMALGAMATED BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 4

WHY THE WRIT SHOULD BE GRANTED:

I. The court below misinterpreted the scope and meaning of the holding of this Court in *Laird* v. *Tatum* 11

II. The court below erred in dismissing as non-justiciable petitioners' claim that the FBI's inspection of their bank records without legal process violated their First Amendment right to associational privacy and their Fourth Amendment right to be secure from unreasonable searches and seizures 17

CONCLUSION 22

APPENDIX A—Opinion of the United States Court of Appeals 1a

APPENDIX B—District Court's Findings of Fact and Conclusions of Law 23a

APPENDIX C—Judgment of the United States Court of Appeals 38a

APPENDIX D—Denial of Petition for *En Banc* Rehearing 40a

Table of Authorities

PAGE

Cases:

Anderson v. Kugler, 56 N.J. 210, 265 A.2d 278 (1970) 16

Bach v. Mitchell, 71-6-22, —— F. Supp. —— (W.D. Wis. January 12, 1973) 16
Baggett v. Bullitt, 377 U.S. 360 (1964) 12
Baird v. State of Arizona, 401 U.S. 1 (1971) 11
Baker v. Carr, 369 U.S. 186 (1962) 13
Bates v. City of Little Rock, 361 U.S. 516 (1960) 14
Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D. N.Y. 1968) 17
Broadrick v. Oklahoma, —— U.S. ——, 37 L. Ed. 2d 830 (June 25, 1973) 11

Application of Cole, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965) 17-18, 20
Cortright v. Resor, 447 F.2d 245 (2d Cir. 1972) 19

Dombrowski v. Pfister, 380 U.S. 479 (1965) 12
Donaldson v. United States, 400 U.S. 517 (1970) 17, 18
Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972) 16
Dosek v. United States, 405 F.2d 405 (8th Cir. 1968) 20

Flast v. Cohen, 392 U.S. 83 (1968) 13
Furniture Workers Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 17

Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968) 20
Gibson v. Florida Legislative Committee, 371 U.S. 599 (1963) 12, 14

PAGE

Handschu v. Special Services Division, 349 F. Supp. 766 (S.D.N.Y. 1972) 16
Holmes v. Church, 70 Civ. 5691 (S.D.N.Y. June 14, 1971) 16

Kent State University Vietnam Veterans Against the War v. Fyke, C 72-1271 (N.D. Ohio, July 19, 1973) 16
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 11-12

Laird v. Tatum, 408 U.S. 1 (1972) 2, 11, 12, 13, 14, 15, 16, 17
Lamont v. Postmaster General, 381 U.S. 301 (1965) 12
Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961) 19

NAACP v. Alabama, 357 U.S. 449 (1958) 12
National Labor Relations Board v. Friedman-Harry Marks Clothing Company, 301 U.S. 58 (1937) 17

Philadelphia Resistance v. Mitchell, No. 71-1738 —— F. Supp. —— (E.D. Pa. Dec. 27, 1972) 16
Philadelphia Yearly Meeting v. Tate, 71 Civ. 849 (E.D. Pa. July 14, 1972) 16
Plummer v. City of Columbus, —— U.S. ——, 42 L.W. 3222 (October 16, 1973) 11
Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam,* 393 U.S. 14 (1968) 18

Shelton v. Tucker, 364 U.S. 479 (1960) 14
Stark v. Connally, 347 F. Supp. 1242 (N.D. Calif. 1972) (three-judge court), prob. juris. noted *sub nom.* Stark v. Shultz, 42 L.W. 3194 (1973) 18, 20

PAGE

Talley v. California, 362 U.S. 60 (1960) 12

United States v. Couch, —— U.S. ——, 41 LW 4107 (Jan. 9, 1973) 20
United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).. 17
United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972) 19
United States Servicemen's Fund v. Eastland, —— F.2d ——, No. 71-1609 (D.C. Cir. Aug. 30, 1973) 18

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) 16

Constitutional Provisions:

United States Constitution
First Amendment 3, 11, 13, 15, 17, 18, 20
Fourth Amendment 3, 17, 20
Ninth Amendment 3, 17

Statutes:

12 U.S.C. §1829(b) 20
31 U.S.C. §§1051-1122 20

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Petitioners,

—v.—

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a petition for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 12, 1973, affirming dismissal of the complaint on the ground that petitioners failed to present a justiciable controversy.

Opinions Below

The opinion of the United States Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York (Oakes, J., dissenting) is reported at 480 F.2d 326 and is set forth in the Appendix *infra*, pp. 1a-22a. The order of the Court of Appeals denying the petition for a rehearing *en banc* (Oakes, J., dissenting) is set forth in the Appendix, *infra*, pp. 40a-41a. The District Court's findings of fact and conclusions of law are not officially reported and are set forth in the Appendix, *infra*, pp. 23a-37a. The opinion of the District Court denying respondents' motion to dismiss the complaint for lack of subject matter jurisdiction is reported at 327 F. Supp. 238.

Jurisdiction

The judgment of the Court of Appeals was entered on June 12, 1973 (Appendix *infra*, pp. 38a-39a) and a timely petition for rehearing *en banc* was denied by order entered on July 10, 1973 (Appendix *infra*, pp. 40a-41a). By order dated September 26, 1973, Mr. Justice Marshall extended the time to file this petition until November 7, 1973. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

Questions Presented

1. Does this Court's decision in *Laird* v. *Tatum*, require dismissal of petitioners' complaint on the ground of lack of justiciable controversy, where petitioners are engaged in constitutionally protected political activities and are challenging an unlawful and overbroad investigation of their activities, political associations and beliefs conducted by agents of the Federal Bureau of Investigation and the sub-

sequent unwarranted dissemination of the information collected?

2. Does a bank depositor present a justiciable controversy when it challenges an FBI search of bank records revealing protected political associations, without search warrant or subpoena as violative of the First, Fourth and Ninth Amendments?

Constitutional Provisions Involved

The following constitutional provisions are involved:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Statement of the Case

Petitioner Fifth Avenue Peace Parade Committee ("the Committee") and the individual petitioners, members and officers of the Committee, have at all relevant times participated in activities designed to express non-violent opposition to the war in Southeast Asia (R162).*

A highpoint of petitioners' work was the Moratorium which took place in Washington, D.C. during the weekend of November 14-16, 1969. On that weekend, hundreds of thousands of Americans from all walks of life assembled in the Capital to petition their elected representatives and express their opposition to the war in Vietnam (R166-172).

The Committee together with other groups throughout the United States actively participated in the preparations for the Moratorium. For example, the Committee engaged charter bus companies to supply transportation to interested persons at a nominal cost. All money collected by the Committee for bus tickets for this purpose was deposited in at the respondent Amalgamated Bank of New York (hereafter "the Bank") under the Committee's account name "Washington Transportation Fund" (R171-2, 181, 202, 204, 210-11, 221).

The evidence in the record establishes that preparations for the Moratorium demonstration were carefully made and included numerous meetings between representatives of the Federal Government and representatves of the demonstrators. Preparations included choosing appropriate assembly

* "R" references are to the appropriate pages of the Appendix filed with the Court of Appeals.

sites, arranging routes for the march and installing various facilities for the demonstrators. Information concerning the number of persons expected to attend was routinely exchanged on a daily basis between the Government's representatives and the national organizing committee, of which the Committee was a constituent (R173-74, 178, 179, 272, 312-17, 321).

Triggered by nothing more than the Committee's participation in the preparations for the Moratorium, the FBI undertook an extensive investigation of the Committee's activities. The information collected was maintained at the New York office of the FBI in File No. NY 100-167288, specifically set up to serve as a repository for all the investigative reports and other information collected in this investigation. According to respondents, the file ultimately grew to eleven (11) volumes (R258-59).

The Government has never claimed that this investigation was undertaken in connection with any suspected or actual criminal or otherwise illegal activity. Indeed, the respondent federal officials have consistently maintained that the avowed purpose of the investigation was to ascertain the anticipated "size, scope and nature" of the Moratorium activities (R238, 294, 302, 414, 417, 452). Accepting this statement as true, however, merely emphasizes that the investigative acts were unauthorized and overbroad and inconsistent with their professed purpose. Moreover, the admitted dissemination of the collected information months after the Moratorium is utterly unjustified and itself constitutes an impermissible burden on First Amendment rights.

At a minimum, respondents' investigation of the Committee's political activities included the following:

1. Special Agent Constantino located the Washington Transportation Fund account at the respondent Bank. Although the agent did not have a search warrant, subpoena, court order or letter of authorization, he obtained from an unidentified "source," the records pertaining to the Committee's account, as well as a related account (R217-18, 238, 239, 240, 241, 254).

2. The information obtained about the account was recorded in an FBI investigative report known as an FD 302 report (Plf. Ex. 2, R487). The report, introduced in evidence at the trial, contains the following information:

(a) The name, address and account number of the Washington Transportation Fund;

(b) The date the account was opened;

(c) The amount of initial deposit only;

(d) The names of Judy Berr, Leon Craig and Norma Becker, officers of the Washington Transportation Fund authorized to sign checks, and members of the petitioner class;

(e) The name of petitioner Deborah Weisburd and Abe Weisburd, the officers of the supposedly related Labor Committee authorized to sign checks on that account; and

(f) The name of the Bank officer, Sarah T. Malloy, to be subpoenaed if public disclosure of the information is required.

According to the testimony of the FBI agents involved, this aspect of the investigation was consistent with its

over-all purpose to determine the size of the demonstration. Specifically, they claim that the Bank investigation was undertaken to learn how many buses and trains the Committee was financially able to charter (R265). Yet, it is apparent that none of the information obtained from the Bank (e.g. names of signatories, date account opened, amount of initial deposit) could conceivably assist in determining the number of people the Committee was transporting to the Moratorium. Moreover, the FD 302 report was not even typed until four days after the demonstration (R246, 247).

3. On the morning of November 15th, the FBI stationed 56 Special Agents at various departure points in New York City to observe the demonstrators boarding the buses chartered by the Committee for Washington, D.C. (R282-84).

4. Approximately three months after the Moratorium, in January or February, 1970, the New York office of the FBI prepared a two hundred page summary report of its eleven (11) volume investigative file (R119, 306). This summary report was sent to the FBI's Washington Bureau "long after the Moratorium day events were over with" (R300). In addition, respondents admitted disseminating reports of petitioner's Moratorium activities as follows:

> F.B.I. Headquarters, Washington, D.C. disseminated reports of plaintiffs' Moratorium Day activities to the United States Secret Service; United States Department of Justice; United States Internal Revenue Service; and the Office of Special Investigations (OSI), United States Air Force.

The New York City Division of the F.B.I. disseminated reports to the United States Secret Service, New York City; the 108th Military Intelligence Group, United States Army; and the Naval Investigative Service Office, United States Navy, New York City (R332).

Petitioners filed this lawsuit in June 1970 seeking a declaration that the FBI's investigation of their lawful political activities, including the inspection of their bank records, was overbroad and a violation of their First, Fourth and Ninth Amendment rights, an injunction against any further investigation or further dissemination of the FBI's investigation reports about them and destruction of the pertinent files.

Respondents refused to disclose their investigative reports or the nature of the information contained therein, and the District Court upheld their refusal. Accordingly, petitioners' knowledge of the scope and extent of the FBI's investigative and surveillance activities and dissemination of the information collected is limited. The District Court, during pre-trial discovery and at trial, consistently refused to permit petitioners to obtain the facts underlying the FBI's activities regarding them, although all such facts were solely in the possession of respondents. By its actions the District Court effectively precluded petitioners from discovering facts necessary to prove their claims. The District Court, for example:

(a) Vacated petitioners' notice to depose defendant John F. Malone and refused to permit petitioners to depose any other person having knowledge of the scope, nature and extent of the investigation (R125).

(b) Refused to permit petitioners to inspect the FBI's eleven volume investigative file (File No. 100-167288) opened specifically for the purpose of the investigation complained of and containing reports of the investigation (R137), although (i) the file was not classified secret (R306-7), (ii) there was no valid invocation of any privilege by the Attorney General, and (iii) the District Court did not itself inspect the contents of the file, other than to review, *in camera,* respondents' summary of its contents.*

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* Although the District Court denied petitioners' motion for inspection of the file, it was apparently troubled by respondents' refusal to voluntarily produce it. In a memorandum decision entered after the denial of petitioners' motion for inspection and following the Court's inspection of respondents' summary of the file, the District Court wrote:

> "On December 6, 1971, this court signed and filed an order regarding discovery matters in this suit. As required by a provision thereof, the court has received from the United States Attorney a Federal Bureau of Investigation Report No. NY 100-167288 [i.e., the summary] and inspected same *in camera*. This report is classified 'Secret.'
>
> "My inspection of the generally relevant materials engenders some astonishment as to (1) why the report is regarded and classified *'Secret'* and (2) what particular discovery benefits are conferred thereby on the parties in this case, save perhaps defendants. Nevertheless, recognizing that at least presently I may not be qualified and competent to be sure about such matters, I request that the Attorney General authorize release of pages 25 through 44 and 100 for possible use by both sides at trial for which counsel must be ready beginning January 4, 1972."

Nothing was ever produced. Respondents' counsel advised the District Court at the commencement of trial that "the Attorney General declines to produce those sections of the investigatory file requested by Your Honor" (R160). Moreover, toward the end of the trial, the FBI's New York Supervisor testified under oath that the file itself was not classified secret (R306-7). Petitioners again renewed their motion for production and pointed out that the Court's prior ruling rested on the belief that the file was "secret," a fact communicated to the Court by *ex parte* letter of respondents' counsel dated December 3, 1971 transmitting the re-

The unfortunate truth is that petitioners who have progressed with this action through preliminary motions, pretrial discovery, trial and appeal have been utterly frustrated in all their efforts to obtain disclosure of the facts concerning respondents' investigation of them. Without such disclosure, petitioners' right to trial was substantially prejudiced.

Although unnecessary to its decision, the Court of Appeals summarily sanctioned the District Court's unusual discovery rulings with the statement that it was "the unusual and exceptional case where the determination of the trial court (in discovery of Governmental documents) is set aside." 480 F.2d at 333.

Petitioners do not challenge the authority of the FBI to conduct a specific investigation to determine in advance the size of the Moratorium so that adequate preparations could be made to protect persons and property. The crux of petitioners' complaint is that the activities of the FBI were overbroad and went far beyond the professed purpose of the investigation. The information collected concerning petitioners' identities and political associations, and disseminated months after the Moratorium to wholly unrelated agencies such as the Internal Revenue Service, was not reasonably related to any legitimate governmental interest. That such governmental conduct was occasioned by nothing more than petitioners' participation in constitutionally protected activities underscores the unlawful nature of that conduct. Petitioners were not permitted to inspect any document evidencing such authority, and aside

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quested summary. (R119). The District Court nonetheless adhered to its prior ruling and refused to order production of the file or inspect its contents *in camera* (R238, 267-8, 311, 326-8, 464).

from some cryptic references in the testimony of FBI agents to some unspecified "Presidential directive" (R49) the record is barren of any evidence of "authority." *

WHY THE WRIT SHOULD BE GRANTED

I.

The court below misinterpreted the scope and meaning of the holding of this Court in *Laird* v. *Tatum*.

In ruling that petitioners failed to present a justiciable controversy, the majority of the Court of Appeals misread this Court's 5-4 holding in *Laird* v. *Tatum*, 408 U.S. 1 (1972), and ignored other decisions of this Court and other federal courts which have sustained as justiciable complaints by citizens challenging overbroad governmental action directed specifically at them which abridges First Amendment rights. See, e.g. *Plummer* v. *City of Columbus*, —— U.S. ——, 42 L.W. 3222 (October 16, 1973). Cf. *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L. Ed. 2d 830 (June 25, 1973).

Governmental conduct challenged as overbroad has been held to violate First Amendment rights not because the activity was aimed directly at free speech, but because such action had the tendency to cause people to limit their activities protected by the First Amendment. E.g., *Baird* v. *State of Arizona*, 401 U.S. 1 (1971); *Keyishian* v.

* Petitioners were not permitted to discover the precise nature of the alleged authority of the FBI to conduct this investigation. Recent disclosures in the Watergate hearings, however, illustrate that such "directive" is not always synonymous with a validly issued Executive Order, and can provide evidence of illegal or unconstitutional conduct emanating from the White House itself.

Board of Regents, 385 U.S. 589 (1967); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Gibson* v. *Florida Legislative Committee,* 371 U.S. 599 (1963); *Talley* v. *California,* 362 U.S. 60 (1960); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); see *Laird* v. *Tatum,* 408 U.S. 1, 13 (1972). In one broad stroke, however, the majority below would close the doors of the federal courts to a wide variety of lawsuits in which citizens challenge overbroad governmental action directed specifically at them which intrudes into their personal affairs and political beliefs and associations.

Tatum does not support such radical alteration in the jurisdiction of the federal courts. Indeed, the Chief Justice in his majority opinion was careful to reaffirm prior decisions of this Court which expressly uphold the right of a plaintiff to challenge the exercise of governmental power that is "regulatory, proscriptive, or compulsory in nature." 408 U.S. at 11.* The only limitation enunciated by *Tatum* was that a plaintiff establish that he is "presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging." *Id.*

Tatum, brought on behalf of a nationwide class of civilians, was a broad attempt to enjoin a practice by the

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* As Chief Justice Burger stated:

"In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. E.g., Baird v. State Bar of Arizona, 401 U.S. 1, 27 L. Ed. 2d 639, 91 S. Ct. 702 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); Lamont v. Postmaster General, 381 U.S. 301, 14 L. Ed. 2d 398, 85 S. Ct. 1493 (1965); Baggett v. Bullitt, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964)." *Id.*

United States Army of gathering information about mostly public political events, in aid of the Army's "civil disturbance mission." Writing for the majority, the Chief Justice took pains to point out that the plaintiffs in that case were not complaining about specific acts of government officials directed against them, but were challenging "the existence and operation of the [Army's nationwide] intelligence gathering system." 408 U.S. at 3. Reviewing prior decisions striking down governmental rules or practices which inhibited the exercise of First Amendment rights, the Chief Justice concluded that in each of these cases relief was granted to particular individuals who were the *direct* targets of the challenged governmental practice.

In this case, petitioners have precisely the kind of individualized claims that were found to be absent in *Tatum.* They have an intensely "personal stake" in the outcome of the litigation*—they are the subjects of the challenged investigation; their bank accounts have been investigated; their political activities watched; and it is they who have been the subject of widely disseminated reports long *after* the investigation was over. Moreover, they are the persons who are intimidated by the knowledge that the eleven volume file on their activities and political views is still maintained and disseminated by the FBI. Not only are petitioners complaining about police actions which never occurred in *Tatum,* but they are the very persons directly affected by those actions.

The *Tatum* plaintiffs sought to have the federal courts review the military intelligence gathering system in the

* See e.g., *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *Baker* v. *Carr,* 369 U.S. 186, 198 (1962).

abstract and determine whether it was appropriate to the Army's mission. The majority of this Court refused to do so on the ground that the *Tatum* plaintiffs had demonstrated insufficient individualized interest in the Army surveillance system to warrant judicial review.

Such an abstract determination is not sought at bar. The Court is not asked to review the broad policies of the Executive Branch with respect to the functioning of one of its agencies. Rather, it is asked to determine petitioners' narrow claim that specific investigative acts directed against them were overbroad and unrelated either to the avowed purpose of the investigation or to any legitimate governmental interest. As Judge Oakes stated succinctly in his dissent: "[I]t is totally immaterial to the ascertainment of the number of protesters going to Washington to know or list the names of the people authorized to sign checks on the Washington Transportation Fund." 480 F.2d at 335.

This Court has repeatedly struck down as unconstitutional governmental investigative activity destructive of associational rights in the absence of an overriding showing of governmental need. E.g., *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U.S. 539 (1963). In *Gibson,* this Court cautioned:

> ". . . regardless of the label applied, be it 'nexus', 'foundation,' or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation* between the information sought and a subject of overrid-

ing and compelling state interest." 372 U.S. at 546 (emphasis added).

The majority opinion below completely ignores these principles and the adverse and undesirable impact on the free exercise of First Amendment rights generated by the presence of government surveillance of the political marketplace. As Judge Oakes recognized in his dissenting opinion:

> "*Bates, Patterson* and *Louisiana ex rel. Gremillion* v. *NAACP, supra,* are the staunchest of authorities for the right of the members of the Fifth Avenue Peace Parade Committee to have remained anonymous and not to have had—for whatever purposes Big Government might wish to make further use of them—their names listed and kept in 'security agency files'." 480 F.2d at 335.

Furthermore, it is important to point out that this Court specifically indicated that had the facts in *Tatum* been similar to those in this case, the complaint would not have been dismissed. In his opinion the Chief Justice quoted a passage of the Court of Appeals opinion which "properly identified the issue presented":

> "There is no evidence of illegal or unlawful surveillance activities. *We are not cited to any clandestine intrusion* by a military agent." 408 U.S. at 9, quoting 444 F. 2d at 953 [emphasis supplied].

This case contains all the evidence of "clandestine intrusion" that this Court found lacking in *Tatum.* Faced with the allegations made here, the Court should sustain the

complaint for reasons set forth at the conclusion of its *Tatum* opinion:

> "[W]hen presented with claims of judicially cognizable injury . . . federal courts are fully empowered to consider claims of those asserting injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied." 408 U.S. at 15-16.

It is significant in this respect that other challenges to overbroad police surveillance of political activities have recently gone to trial.* In those few cases which have been decided on the merits following a trial, there has been considerable disagreement at the appellate level about the scope of *Laird* v. *Tatum, supra.* Compare for example, the majority and dissenting opinions below with the majority and dissenting opinions in *Donohoe* v. *Duling*, 465 F.2d 196 (4th Cir. 1972).

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* See, e.g., *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972), reversing 71-514-J (D. Mass. June 13, 1971), and remanding for class action determination and discovery proceedings; *Handschu* v. *Special Services Division*, 349 F. Supp. 766 (S.D.N.Y. Oct. 24, 1972) (Weinfeld, J.) (denying motion to dismiss); *Bach* v. *Mitchell*, No. 71-6-22, —— F. Supp. —— (W.D. Wis. January 12, 1973) (denying motion to dismiss); *Philadelphia Resistance* v. *Mitchell*, No. 71-1738 —— F. Supp. —— (E.D. Pa. Dec. 27, 1972) (ordering discovery on extent of undercover surveillance of political activities); *Kent State University Vietnam Veterans Against the War* v. *Fyke*, No. C 72-1271 (N.D. Ohio, July 19, 1973) (denying motion to dismiss); *Holmes* v. *Church*, 70 Civ. 5691 (S.D.N.Y. June 14, 1971) (enjoining police surveillance of political activists "neither suspected of nor engaged in criminal activity"); *Anderson* v. *Kugler*, 56 N.J. 210, 265 A.2d 278 (1970), reversing 106 N.J. 545 (Ch. Div. 1969), and remanding for evidentiary hearing; *Philadelphia Yearly Meeting* v. *Tate*, 71 Civ. 849 (E.D. Pa. July 14, 1972) (denying motion to dismiss).

Quite apart from these cases, all litigated in the shadow of *Laird* v. *Tatum*, *supra*, federal judicial scrutiny of covert police intelligence-gathering operations in areas touching upon First Amendment rights is well established. Where the police are not gathering evidence of a specific crime but are conducting intrusive and generalized surveillance, courts have not hesitated to enjoin the intrusion. See, e.g., *Bee See Books, Inc.* v. *Leary*, 291 F. Supp. 622, 627 (S.D.N.Y. 1968), *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948). Cf. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Company*, 301 U.S. 58 (1937); *United States* v. *McLeod*, 385 F.2d 734, 750 (5th Cir. 1967).

II.

The court below erred in dismissing as non-justiciable petitioners' claim that the FBI's inspection of their bank records without legal process violated their First Amendment right to associational privacy and their Fourth Amendment right to be secure from unreasonable searches and seizures.

The majority below summarily dismissed petitioners' contention that a justiciable controversy was presented by their claim that inspection of the Committee's bank account records by the FBI without any summons, subpoena or court order or any advance notice was an invasion of petitioners' freedom of association and right of privacy protected by the First, Fourth and Ninth Amendments.

To support this conclusion the court below erroneously relied upon this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1970) and its own conclusion in *Application of Cole*, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S.

950 (1965). As Justice Blackmun pointed out in his opinion for the Court in *Donaldson*, a person's standing to challenge a government inspection of records in the hands of third parties depends upon his demonstrating "a significantly protectable interest" [400 U.S. at 531] in the record information.

In *Donaldson* and *Cole* no such interest was demonstrated. But in cases where the government has sought to obtain information about a political organization by inspecting their bank records, the organization's First Amendment interest in protecting the information is manifest. This distinction was recognized by Mr. Justice Blackmun himself, before his appointment to this Court, in *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968), in which government subpoenas of the bank records of the Republican Party in Arkansas were invalidated on First Amendment grounds. See also *United States Servicemen's Fund* v. *Eastland*, —— F.2d ——, No. 71-1609 (D.C. Cir. Aug. 30, 1973). Cf. *Stark* v. *Connally*, 347 F. Supp. 1242 (N.D. Calif. 1972) (three-judge court), prob. juris. noted *sub nom. Stark* v. *Shultz*, 42 L.W. 3194 (1973).

The reasoning underlying the First Amendment standing of a political group like the petitioners in this case to challenge a governmental inspection of their bank records rests upon the fundamental rights of citizens not to be compelled to disclose their identities and political affiliations.* As the D.C. Circuit recently stated in its decision in *United States Servicemen's Fund* v. *Eastland, supra*:

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* In his dissent below, Judge Oakes wrote:

"To gather the names of the authorized signatories, however, is no different from ascertaining membership (or leadership) in a 'group espous[ing] dissident beliefs' struck down in

"If the forced disclosure of the information concerning contributors to and membership in the appellant association violates its First Amendment rights, then it is too clearly an aggrieved person when a third person is under compulsion by the defendants to disclose this information to warrant discussion . . .

• • •

"The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1962); *Pollard* v. *Roberts*, 393 U.S. 14 (1968), affirming the judgment of the three judge district court for the district of Arkansas, 283 F. Supp. 248" Slip. Op. at 17, 23.

Bates, Patterson and *Gremillion, supra.* If there were dissemination of such a list beyond the FBI, which we do not know (although we do know that the names remain in the FBI files), so much the worse. It is no answer to my mind to suggest as the majority seems to imply that the Committee wanted to publicize its program in the press and through flyers and leaflets or 'to make visible' public opposition to the war; publicizing the Committee's efforts and involuntarily listing the members are two different things. Cf. *United States* v. *National Committee for Impeachment, supra.* Nor is it any answer to say that this is a very small infringement or a very little interference with constitutional guarantees. As I have said in another context, '[e]ven a very little chill on a very big right is too much.' *Cortright* v. *Resor, supra*, 447 F.2d at 258 (dissenting opinion)." 480 F.2d at 335-6.

Moreover, even those cases not involving First Amendment rights which have followed *Cole*, and have held that depositors have no standing to assert constitutional defenses, have turned on the presence of the following factors completely absent in this case: (1) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, and (2) the government agency was seeking records claimed to be relevant and material to a possible violation of law turn under inquiry. See, e.g., *United States* v. *Couch*, —— U.S. ——, 41 LW 4107 (Jan. 9, 1973); *Dosek* v. *United States*, 405 F.2d 405 (8th Cir. 1968); *Galbraith* v. *United States*, 387 F.2d 617 (10th Cir. 1968).

The importance of these factors as minimal Fourth Amendment requirements was underscored by the recent decision in *Stark* v. *Connally, supra.* There, several bank depositors challenged the constitutionality of the Bank Secrecy Act, 12 U.S.C. §1829(b) and 31 U.S.C. 1051-1122, requiring banks and similar financial institutions to keep certain records and authorizing the Secretary of the Treasury to require such institutions and parties participating in transactions with such institutions to report financial transactions, without any form of judicial or administrative summons, subpoena or warrant.

The three-judge Court in *Stark* held that since the reporting provisions for domestic financial transactions contained no procedural safeguards, such as a summons or search warrant, they constituted an impermissible invasion of a

citizen's right to privacy and an unreasonable search in violation of Fourth Amendment.*

The search of petitioners' bank records, without warrant or subpoena, yielded the identity of individuals associated with the petitioner Committee in exactly the same fashion as a seizure of the Committee's membership list. Unless certiorari is granted on this issue, the FBI and other government agents will be able to accomplish indirectly that which this Court has specifically forbidden the government from doing, i.e., compel the disclosure of membership lists.

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* It is worth noting that the Government's brief in *Stark* was quoted in the court's opinion as follows:

> " 'Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government *must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested' " (Court's emphasis). 347 F. Supp. at 1251.

Thus, the FBI Special Agent in this case did precisely what the Government in *Stark* asserted it was powerless to do under existing law, i.e., obtained information from bank records without summons or subpoena.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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